



parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses and oral argument. The parties elected to file post-hearing briefs. The Arbitrator received timely briefs from both parties on April 28, 2009, which have been carefully considered in the preparation of this Decision and Award.

A stenographic record of the arbitration hearing was kept and a transcript of the proceedings was provided to the Arbitrator.

### **THE GRIEVANCE**

Cleo is in the business of manufacturing Christmas gift-wrapping products. James Miles, had been employed by Cleo for 33 years as a factory worker in the Company's Memphis, Tennessee facility. He was terminated on March 16, 2007 for "Being the aggressor in a fight" He filed the grievance in this case on March 19, 2007, claiming that his discharge was "unjust" and asking "To return to work and made whole."

### **THE ISSUE**

Was Miles "dealt with unjustly" by Cleo when he was terminated on March 16, 2007?

### **PERTINENT PROVISION OF THE CB**

Article VI Seniority Section 11 Seniority of an employee shall be terminated under the following conditions: (b) Discharge for cause.

Article VIII Grievance Procedure Step 3: . . . The Company, upon request of an authorized Union Representative, shall make available the personnel file of the employee involved in the grievance for review. Adequate time shall be allowed for the review in offices of the Personnel Department.

Article IX Discharge Section 1. In the event an employee is discharged by the Company and

if the Union believes that he has been dealt with unjustly, such discharge shall be placed before the Union and Company Committee under Step 3 of the grievance procedure. . . .

Article XX Rules and Regulations Section 1. . . . The following violations of company standards of conduct . . . shall receive disciplinary action as indicated.

Group II First violation of any rule - Discharge. At the Exclusive Discretion of the Company.

15. Being the aggressor in a fight.

### **THE TESTIMONY**

Set forth in this Section is a recitation of the testimony taken from the verbatim transcript and references to the Exhibits entered in evidence.

#### **Brenda Freeman**

Brenda Freeman was a press operator on the third shift.<sup>1</sup> On March 13, 2007, James Miles and Harold Little were the press operators on another press in her area (T.45-46) She testified that toward the end of the shift, Little was talking to a co-worker, Eric Temple, when Miles “jumped up and started cussing them out.” Miles was standing on a catwalk above the presses cursing at Little; e.g., he yelled that he would “bust your god damn head.” She did not recall hearing either Little or Temple say anything to Miles to provoke him. Miles then came down the press ladder and “started looking around like he was looking for something.” (T. 20) He picked up an impression roller arm (a metal bar that fits in the press) and started to walk toward Little with “rage” on his face. Little was backing up. (T 21-22) Freeman thought that Miles was going to hurt Little, and she called supervisor Milton Carr for help. (T 21- 29)

On cross examination by the Union’s Representative, Mr. Calliste, Freeman was asked: “If Mr. Little had a knife, you would have seen it?” She responded “I didn’t see a knife.” Mr. Calliste’s follow-up was “I just asked you a question, from the direction that you were standing?” She answered, “Yeah. If he had had one, I probably would have seen it. I walked away from the desk to use the mic. I didn’t see Harold with a knife.” (T 34)

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<sup>1</sup>Freemen was in lay off status at the time she was called as a witness to testify in the hearing.

### Milton Carr

Carr, the printing department supervisor, testified that he received a “frantic call” on his radio from Freeman - “Someone needs to get over here, 911 or something like that. Someone needs to get over her quickly.” He arrived on the scene within seconds after getting the call and heard Miles and Little shouting profanities at each other. He could not remember exactly what was said because “It’s been a couple of years . . . I cannot honestly tell you what was - - I know it was a lot of profanity at that time.” (T 65- 66) Miles was holding an impression bar in his hand advancing toward Little. At the time, Carr was standing between Miles and Little. He could not describe Little’s bodily reaction because, he was not looking at him. He was “primarily focused” on Miles cursing and coming toward Little with the roller bar in his hand (T. 74,78) Little was “somewhere” behind him. He did not see Little with a knife or see or hear anything from Miles or other employees to indicate that Little had a knife and that Miles was defending himself.

Carr ordered Miles to put the bar down. First Carr testified that he could not recall whether he asked Miles to explain his behavior (T.73), but later stated that he was “sure I did” but did not recall what Miles told him was the cause. (T 74). Then, Carr told him to come to the office with him but Miles said that he was “defending” himself and asked “: Why do I have to go to the office?” (T 70)<sup>2</sup> When they got to the office, Miles said that “he didn’t feel; that he was justified in being there,” and asked “Why am I in here?” Carr explained the seriousness of the incident and told him that what he had done “could be considered assault,” and that they would have to “get with HR to see what’s going on, what would be the reprimand for that.” Miles did not tell him that Little had a knife.

The next night, March 14, “everyone who was involved at the time, all the witnesses” and William Hall and Lee Anderson, Union President, were brought to the conference room at the beginning of the shift for an “investigation.”<sup>3</sup> Cesar Reyes, then Director of Human Resources, conducted the investigation. (T 67) The “witnesses” who attended the meeting were Freeman, Little and Miles (T. 75) and they were questioned by Reyes. (T 67) Little said that “the man became aggressively verbal, abusive to him without any cause.” (T. 76) Carr was “sure” that Miles was

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<sup>2</sup>Carr did not ask Miles what he meant by “defending himself.”

<sup>3</sup>Hall was not called to testify by either party.

asked “Why did you do this?” but Carr did not remember his answer. Carr was able to recall though that Miles did not accuse Little of having a knife.<sup>4</sup> In fact, according to Carr, he never heard of the knife defense from anyone until Anderson and Miles testified in the arbitration hearing (T.193-194)

Carr recommended termination to HR “Because we had the elements of a fight. There were no physical blows thrown, but there were elements of a fight. There was profanity. There was aggression. There was advancement with a weapon.” In explaining his “sensitivity” to workplace violence, he stated: “I read the papers. There are a lot of things happening in the - - of things that could be prevented. And this just seemed - - it seemed to be a volatile situation.”<sup>5</sup>

#### Denise Walters

Denise Walters, a Cleo employee of almost 20 years and since 2006, an HR supervisor, testified that the only written documentation describing the event leading to the discharge was an email sent from Reyes to Ken Hardy, another HR employee, dated April 16, 2007. (T 86) Reyes’ email advised Hardy that Miles was terminated for picking up a press arm and threatening Little with “bodily harm.” According to the email, the Company’s investigation revealed that Miles was “the aggressor” in the altercation, and that “According to the witnesses, Mr. Miles was falling asleep on top of the catwalk when he woke up and thought Mr. Little was talking about him. Mr. Miles then proceeded down the catwalk, picked up the press arm, and walked toward Mr. Little as to strike him. The press operator contacted the supervisor who saw Miles with the press arm and asked him to put it down and come to the office. Miles was subsequently suspended while a thorough investigation was conducted. The recommendation from Human Resources was to terminate Miles for a group 2 Being the aggressor in a fight.” Co. Exhibit 4. Reyes’ email to Hardy was the only documentation explaining the basis for the termination or referencing the March 13 incident offered by either party.

Walters testified that the Company knew of no explanation given by Miles for the incident. (T 111) Rather, the Company relied on “verbal statements” from Little, Freeman and Carr and

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<sup>4</sup>Carr recalled that Miles started to say something to defend himself during the investigation but Anderson told him not to say anything “at this time.” (T.80)

<sup>5</sup>Carr was asked whether he gave a “statement to the Company as to what happened.” He said that he gave a written statement “in an email to the department head.” No statement was produced. (T. 69)

Miles' disciplinary record over his 33 years of employment to make its decision to terminate him. The employment summary revealed a litany of disciplinary actions against Miles during his 33 years of employment for conduct including tardiness, out of area, failure to punch time card, inefficiency on the job, cursing the nurse, sleeping on the job.

Walters explained that the Company follows its work place violence rule very strictly and named Rodney Green, James Conner and Charles Cole as other employees fired during the same period for fighting.<sup>6</sup>

#### James Miles

Miles' version of the events of that night is very different. He explained that he had a "conflict" with Little "all the time." He was sent to work with Little. He told his Supervisor, William Hall, that he did not want to work with Little because they have had problems before but Hall told him he had to go. On the night in question, Little was supposed to be training him. At 3:00 a.m. Miles said he wanted to go to lunch but Little said he couldn't go and they "got to arguing." (T 165) At 3:45 a.m. he told Supervisor Hall that Little wouldn't let him go; that "He's not teaching me; he's not training me." A little later during the shift, a mechanical problem shut the press down and he went up on top of the press to make a repair. While he "was up there," Little "was down there talking about me . . . to another employee Alvin."<sup>7</sup> Little called him a "dumb MF" and he said back to him, "Man, why you still down there talking about me?" and Little said shut the F up to which he answered, "I'll be down there, he can make me shut up." Miles came down the steps and walked toward Little. "He went in his bag. He grabbed a switchblade out" and Miles took off running. The "first thing he saw was this, the work tool . . . I grabbed it. My first instinct was to grab, to turn around and see was this guy behind me, is he going to stab me, he's going to stick me. He wasn't at me. I grabbed it. I turned around and looked at him. He looked at me. Nobody came at each other." T 164 - 167 Carr approached him and asked, "James, what are you doing with that rod in your hand?" Miles replied "Nothing, Sir" Carr told him to come to the office with him and

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6. Three days prior to the incident involving Miles and Little, Beverly Taylor and Denise Edwards were involved in a verbal altercation (Union Exhibit 4) in which there was contact made and each were given five day suspensions.

7 Later identified as Alvin Smith, but not called as a witness by either party.

asked “What happened?” Miles said “Man, it’s over with. We just had an argument, man. That’s all, a disagreement. It’s over with.” (T 167) He did not tell Carr that Little had a knife. (T. 179, 182)

When Miles arrived for work the next night at 11:00 p.m., he was called to office and met with Hall, Carr and Reyes. He explained to them that when he came down from the top of the press, Little went to his bag and pulled out a knife, he ran away and grabbed the bar; Little did not come at him; he didn’t go at Little - end of story (T.168) Reyes told him to leave the plant; he had to check into it, and three days later Anderson called and told him that he was fired. (T. 169).

A grievance was filed under Article IX Discharge Section 1 and pursuant to that section was placed before the Union and Company Committee under Step 3 of the grievance procedure and then proceeded to step 4. Miles testified that Eric Temple, who was working with Little on March 13 attended the 4<sup>th</sup> step grievance meeting and said “he saw when I came down the steps and I was walking toward Harold when he went in his bag and pulled the knife out.”

Miles explained that Little was not at the Arbitration hearing “for the simple reason we met with him Thursday, all of us right here . . . And he came and admitted that he did pull out a box cutter, which it was a blade. And he also said that I came at him. And I told him I didn’t want him to be a witness because he was lying. That’s why he’s not here.” (T.170) He said that Little was lying “About I’m threatening. Now, he pulled out a box cutter. They said he was only going to come here and admit that he pulled out a box cutter. I said, ‘No, he’s got to come up here and tell a lie, the same way he told his first lie.’ When he was in the meeting Thursday with us, he said, ‘James threatened me, said he’s going to bust my head, and he picked up the pipe and came at me.’ I said ‘No, I didn’t’ That ain’t what happened. So, I don’t want this guy here. If he’s going to lie, if he ain’t going to tell the truth, I don’t want him here. That’s what I said to you all.” But then Miles added “Now, he did admit he pulled out the box cutter, that’s true. But he also said I threatened, which that wasn’t the truth. And that’s why I told him I didn’t want him here if he’s not going to tell the truth. I mean, that’s what I said to him.” (T. 170-172) This is the way Miles described the events when he spoke to Cesar Reyes the Human Resource Manager, what he told management in the 4th step meeting and what he told the National Labor Relations Board during the NLRB’s

investigation of an unfair labor practice charge he filed against Cleo. <sup>8</sup>

Lee Anderson

Lee Anderson, the Union President testified that he spoke to Carr the night after the Miles' incident and Carr told him that Miles had been the aggressor in a fight with Little and threatened him and that the Company had the incident under investigation. (T 143) Anderson also spoke to Miles that night and Miles told him there was an altercation "they were just talking stuff or whatever, and he came down," and Little had a knife and he just picked up the bar. (T.144)

Anderson explained that in several recent discipline cases the Union did not file for arbitration because the evidence in those cases revealed that the discharged employees had been the aggressors in the incidents leading to their terminations. (T. 131) The Union took a different stance in Miles' case because at a membership meeting to consider the Miles discharge, Little was present and told the members that he had a knife that night when Miles came down off the press, and the members decided to seek arbitration. (T.132) Moreover according to Anderson, a week before the arbitration he spoke to Little and Little told him that he had informed Reyes that he had a knife that night. He also testified that he (Anderson) brought this to Reyes' attention at the 4<sup>th</sup> step grievance. (T. 135) However, later, during cross examination, Anderson was asked when he "got involved in terms of speaking to Mr. Little." He replied that he did not speak to Little at all because he had asked the Company to bring Little to 3<sup>rd</sup> and 4<sup>th</sup> step grievance meeting but the Company never produced him. (T 143)

In Anderson's view, "they didn't fight or nothing, and they were just talking," and the Company could have done like other employees . . . either reprimand them by suspending them or whatever . . . and y'all just terminated James Miles, plus we didn't hear the other side of all your witnesses. I was asking in the grievance meeting . . . let me hear your witness, where is your statement . . . y'all never produced none of that . . ." (T 146) He also testified that he spoke to the other employees who had been interviewed by the Company and they told him that they didn't see anything. (T.149) When he spoke to employees they told him that they did not see anything - just heard some talk (T. 151) <sup>9</sup> Miles told him that he and Little were arguing and when he came down

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<sup>8</sup>Reyes did not testify.

<sup>9</sup>Anderson identified employees Barry Jordan and Alvin Smith as eyewitnesses but they told him that they didn't see anything - "just heard them jiving like they normally do." (T. 144-145) The



off press, Little pulled a knife and that's when he grabbed the bar (T.152) According to Anderson, Miles told Reyes the next night at the "investigation" that Little pulled a knife on him. (T.152) In addition, according to Anderson, Little told Anderson a couple of days before the arb that he told Reyes that he had a knife and Anderson brought this to Reyes' attention at 4<sup>th</sup> step.(T. 135) 10Anderson testified that he requested the Company to bring Little to the third and fourth step Grievance meetings since he was one of the participants in the altercation, but the Company never made Little available. <sup>11</sup>

At a Union membership meeting on May 30, 2007, the members voted on whether to proceed to arbitration on the grievances of Green, Conner, Cole and Miles. The membership voted not to take Green, Conner, Cole to arbitration because the Union's investigation of those cases showed that those employees had actually attacked other employees. (T. 131) The local voted to arbitrate Miles case however, because according to Anderson, Little came to the Union's monthly meeting and told the membership that he "did have a knife" and that he "brought that to the attention" of the Company. (T. 132) Anderson also stated that he spoke to Little "a couple of days" before the arbitration and Little told him that he (Little) had told Reyes "that he had a knife," and that he "had brought that to (Reyes') attention during the fourth step grievance." (T. 135). On cross examination, Anderson was asked when he got "involved in terms of speaking with Mr. Little?" and stated that he "didn't speak to Mr. Little at all because I asked you to bring Mr. Little to third step and fourth step grievance meeting since he was the Company witness and y'all never produced him . . . " <sup>12</sup>

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Company did not identify either of these employees as eyewitnesses.

10Anderson also testified that Reyes "acknowledged" that "we said that Harold had a knife" at the 4<sup>th</sup> step conference on March 30. (T. 155)

11Reyes, Wayne Dupre and Greg Hamilton were present for the Company at the 4<sup>th</sup> step when according to Anderson, Miles explained that he was threatened with a knife and that is when he grabbed the bar. (T. 157) Although Counsel for the Company stated on the record that the Company planned to call Hamilton as a rebuttal witness to testify what was said at the 4<sup>th</sup> step meeting. He was not called to testify; nor were Dupre or Reyes called as Company witnesses.

12The Union did not make a pre-hearing request for the production of documents. The Union made a claim on the record that Little gave a "statement," and made an informal request for the statement but no statement was provided.

Anderson acknowledged that without Little's admission, Miles' case probably would not have been pursued to arbitration.

## **POSITION OF THE PARTIES**

### **The Employer**

Miles was the aggressor in the altercation with Little which started out as a verbal confrontation but picked up intensity when Miles grabbed a metal rod and came at Little. There was no credible evidence that excused Miles' conduct.

### **The Union**

Miles picked up the metal bar when, as he was approaching Little during a verbal confrontation, Little pulled out a knife and threatened him.

## **DISCUSSION**

### **Burden of Proof**

The burden of proof in labor arbitration is on the employer where, as in the present case, the employer's right to discipline an employee is limited by the contractual requirement that any disciplinary action must only be taken for "just cause," in this CBA. referred to as "unjust discharge." In defending against a claim of an "unjust discharge" the Company must satisfy both substantive and due process requirements. The substantive requirement is to offer sufficient proof that the employee, in fact, engaged in the conduct for which he was discharged. In addition, a reasonable relationship must be shown between the employee's misconduct and the punishment imposed. And, once proved, the employer must be able to show that the employee knew or should reasonably have been expected to know that engaging in this behavior would likely result in disciplinary action. Finally, discipline must be administered evenhandedly, that is, similarly situated employees must be treated similarly and disparate treatment avoided.

The degree of proof in a discharge case that must be shown to satisfy the substantive

requirement that the employee actually engaged in the conduct leading to his termination can vary from a preponderance of the evidence, too clear and convincing evidence, to evidence of guilt beyond a reasonable doubt, which is typically only used in criminal prosecutions. A preponderance of the evidence is evidence that demonstrates more likely than not that the employee committed the offense resulting in his discharge. In the case of an employee who had invested 33 years of service with an employer at the time of his discharge, fairness demands that the employer's burden be heightened to require that the evidence against the employee be clear and convincing that his behavior justified the loss of his career job. This is such a case and the focus of my evaluation of the record is to determine whether the Company satisfied that heightened burden.

### **Unjust Discharge**

The Company produced evidence that Miles and Little cursed each other and that the verbal assaults escalated when Miles grabbed the iron bar and advanced on Little. Carr stepped between the two men and the incident was defused. Carr did not see Little with a knife nor did Miles explain to Carr that he grabbed the iron rod when he saw that Little had a knife. Thus, the evidence that he was seen picking up the iron rod by Freeman, that Carr saw him with the rod, that Miles admitted picking it up would be the clear and convincing evidence to satisfy the Company's burden of meeting the substantive requirement of proving just cause. But, the Union and Miles say that there was an existing animosity between the two men; that they argued, that they cursed each other in common street language and that when Miles approached Little, Little drew a knife and that is when he grabbed the iron bar. Thus, Miles says that he was not the aggressor, as he was accused by the Company, but rather, Little was the provocateur.

If this was the scenario, discharging Miles and imposing no penalty on Little, might support a finding that the Company violated the requirement that discipline be administered evenhandedly. Discipline may have been justified but if Miles had grabbed the iron rod, as he claims, to defend himself, termination may have been excessive punishment and shown the degree of disparate treatment that might call the discharge into question.<sup>13</sup>

Thus, once Miles asserted the exculpatory claim that Little had menaced him with a knife,

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<sup>13</sup>The evidence revealed that other employee had been terminated for workplace violence - Phillips and Green (T. 98, 140)

the issue became whether there was credible evidence to support that accusation and corroborate Miles' accusation against Little.<sup>14</sup> However, Freeman, who was in the area and who made the 911 call, testified that she did not see Little with a weapon. Carr had his back to Little and could not see if he was holding a knife. However, when Carr confronted him immediately afterwards on March 13, he recalls Miles saying that he was "defending" himself but, when Carr asked him what happened and why he had the rod in his hand, Miles said "Nothing," "it's over," we just had an argument," no mention of a knife. The next night, however, when Reyes conducted the investigation, and Miles was at risk of losing his job, he claims that he accused Little of pulling a knife on him. Carr was present at that meeting and testified that he did not hear Miles make that claim. In fact, Carr testified that he never heard a claim that Little had a knife until the testimony was given in the hearing.

A person who could have resolved this conflict in the testimony was Little. The Union's Brief poses these questions about him: (1) why would Little tell the union membership that he had a knife since he and Miles have had problems in the past and do not get along, and (2) Why didn't the Company call Mr. Little to testify?

The first question posed by the Union raises its own question - did Little actually tell the membership that he pulled a knife on Miles? Anderson, who was the only Union member to testify about the Union's decision to seek arbitration, explained that while the local voted not to arbitrate several other cases because the members had been the aggressors in fights, it voted to take Miles' case to arbitration because Little came to the Union's meeting and told the membership that he did have a knife in his hand, as Miles claimed, on that night. The membership decision on the other cases was certainly understandable, but Anderson's testimony that Little appeared before the members and confessed his part in the incident that led to Miles' discharge was not believable. Although it is said that confession may be good for the soul, to credit testimony that Little admitted behavior to Miles, to Anderson, to Reyes, to management and to the Union membership and may have been willing to come forward to admit that he was guilty of conduct that would very likely lead to his discharge is implausible, and I can not accept it. Indeed, to credit the claim that Little admitted having a knife would require a finding that Little admitted to being the aggressor or at least

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<sup>14</sup>Miles described the weapon that Little displayed variously as a "knife", as a "box cutter" and as "a switchblade."

that he was equally culpable, and thus that he violated the CBA's explicit standard of conduct that "shall" subject the violator to "disciplinary action."

Nonetheless, the missing links to the Union's defense of Miles are Little and Temple. Whether they could have exonerated Miles is just speculation.<sup>15</sup> The Union's question why didn't the Company call Little to testify does not add anything to its defense of Miles. The Company produced what it considered sufficient evidence of Miles' wrongdoing. If Little held the key to absolving Miles, the Union could have and should have made an effort to produce him. He could have been subpoenaed to appear. Suffice it to say, Little did not appear and the claim that his conduct precipitated Miles' action that night has no credible support in this record. Indeed, the absence of Little's potentially exculpatory testimony is seen in Anderson's frank acknowledgment that without Little's admission, the Union would not have brought Miles's termination to arbitration. His admission is not in this record, however, and more than Anderson's testimony is required to find that such an admission was made.

The same can be said for Temple. Miles testified that he came to the 4<sup>th</sup> step grievance meeting and confirmed that Little pulled a knife on him. There is no confirmation in the record. The Union sent him a letter asking him to appear but he did not respond. If he too had exculpatory evidence, the Union could have subpoenaed him to appear. He did not and I have no basis to rely on Miles' statement that Temple could support his defense.<sup>16</sup>

I find that the Company provided sufficient proof that Miles was the aggressor in the March 13, 2007 incident. The Union's effort to challenge the Company's evidence of Miles' wrongdoing was not supported by testimony from the employees - Little and Temple - who the Union claimed could vindicate Miles. The CBA provision citing this form of behavior as grounds for discharge demonstrates a reasonable relationship between Miles' misconduct and his punishment and indicates clearly that he knew or should reasonably been expected to know that engaging in this behavior would likely result in disciplinary action. Finally, the discipline imposed on Miles was administered evenhandedly, that there was no evidence that Miles was treated differently than other employees.

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<sup>15</sup>Miles' explanation for not wanting Little to come to the hearing and testify was so convoluted that I am unable to parse it.

<sup>16</sup>As I explained on the record, I accepted Miles' testimony that Temple attended the 4<sup>th</sup> step grievance meeting. However, Miles testimony that at the 4<sup>th</sup> step meeting Temple corroborated Miles' accusation that Little pulled a knife on him, was not proof of Miles' accusation.

**AWARD**

Having heard the testimony and carefully reviewed the evidence and written briefs in support of the parties' respective positions on the grievance, and in light of the above Discussion, the Arbitrator finds that Miles was discharged for cause and the Grievance is denied

Dated:

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Edward J. Gutman, Arbitrator  
Baltimore, Maryland